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No . . . . .

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD W. WYRICK, WARDEN
MISSOURI STATE PENITENTIARY,
Defendant-Petitioner,

v.

EDWARD FIELDS,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Eighth Circuit Court of Appeals did not err in holding that Fields' statement was involuntarily obtained because the polygraph operator failed to apprise Fields of his constitutional right to counsel after the polygraph indicated deceit, but before further discussions ensued.

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OPINION BELOW

The Opinion of the United States Court of Appeals in *Edward Fields v. Donald Wyrick*, 81-1245 is as yet a non-published Opinion, but is attached to the Petitioner's Brief as Appendix A.

STATEMENT OF THE CASE

Edward Fields was a soldier stationed at Fort Leonard Wood, Missouri when he was charged with rape. After a jury trial, he was convicted and sentenced to 25 years imprisonment. On appeal his conviction was affirmed. *State v. Fields*, 538 S.W.2d 348 (Mo.App. 1976).

Subsequent to the affirmance of his conviction, Fields filed various motions seeking post-conviction relief. All of these motions were denied. See *Fields v. State of Missouri*, 596 S.W.2d 776 (Mo.App. 1980); *Fields v. State of Missouri*, 572 S.W.2d 477 (Mo. 1978). Fields then sought a Writ of Habeas Corpus contending *inter alia* that his confession had been involuntarily obtained. The Eighth Circuit Court of Appeals agreed with Fields and granted the Writ.

Prior to his trial on the rape charge, Fields was released on his own recognizance and had retained counsel for his defense. While on his own recognizance, he agreed to submit to a polygraph examination concerning the alleged rape charge. Fields agreed to appear for the examination without his counsel. Fields' counsel testified at the suppression hearing that "the polygraph [was] to be run and that we be given the results." However, his counsel was of the understanding that "the running of the polygraph would have merely shown deceit or non-deceit and would have been used for the purpose of possible pre-trial negotiations."

Fields submitted to the polygraph examination on December 4, 1974, before an agent of the United States Army Criminal Investigation Division (C.I.D.) at Fort Leonard Wood. Prior to the polygraph examination, Fields was apprised that he had the right to remain silent and to have an attorney present. Fields signed a written form consenting to the examination. Once the examination had been completed, the C.I.D. advised him that

there was some deceit in the polygraph and queried him for an explanation as to why this deceit existed. At thus juncture, Fields admitted to having consensual intercourse with the victim. The C.I.D. officer then asked Fields if he wished to discuss the matter further with another C.I.D. agent and with the Chief of Police of Waynesville, Missouri. This Fields agreed to do. Prior to any conversations with the Chief of Police, Fields was once again given his Miranda warning. Fields repeated the statements he had made to the C.I.D. officer subsequent to the polygraph examination.

On the basis of his statements subsequent to the polygraph Fields was convicted of rape.

REASONS FOR DENYING THE WRIT

The Eighth Circuit has correctly applied the recently enunciated standards of *Edwards v. Arizona,* _____ U.S. _____, 101 S.Ct. 1880 (198:). In that case, the Supreme Court held

The Eighth has correctly applied the recently enunciated standards of *Edwards v. Arizona,* _____ U.S. _____, 101 S.Ct. 1980 (1981). In that case, the Supreme Court held

> The Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation *even if he has been advised of his rights.* We further hold that an accused, . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, *unless the accused himself initiates further communications,* exchanges or conversations with the police. (Emphasis added).

This Court further held that the resolution of each case would depend upon the particular facts and circumstances surrounding that case. The Eighth Circuit has followed the admonitions of the Supreme Court first, in holding that the accused did not voluntarily waive his right to counsel and secondly, applying the facts of this case to the then existing law.

The critical fact inherent in this case is best gleaned from the understanding of counsel for Fields. He was of the understanding that the polygraph would only be used to show deceit or non-deceit and would be used for the purposes of possible pretrial negotiation. Yet, the C.I.D. officer, once deceit had appeared on the polygraph, engaged in a conversation with Fields which subsequently led to an admission of consensual sexual intercourse. The conversation was "initiated" by the C.I.D. officer, not the accused.

The Eighth Circuit did precisely what the Supreme Court admonished all courts to do when faced with similar questions as those in the instant case, i.e. review the facts and circumstances of the individual cases to determine if the defendant has knowingly waived his right to remain silent and have counsel present. *Edwards v. Arizona, supra.* The Court concluded that in the circumstances of this case the fact that Fields consented to the polygraph without his lawyer present did not extend to post-test interrogation. This is an eminently reasonable result, particularly where the purpose of the polygraph was merely to ascertain deceit or non-deceit. Nor does the Eighth Circuit opinion go so far as the Petitioner would contend. It is not a case in which the accused has agreed to the waiver of counsel for all circumstances, but rather deals only with the waiver of counsel for a limited purpose, i.e. the submission to a polygraph test. In other words, he waived his right to counsel during the administration of the polygraph.

Once the C.I.D. officer discovered some "deceit" the inter-

rogation should have ceased and Fields' counsel contacted. Fields did not retain counsel to help him purchase a plot of land, he retained counsel to advise him concerning serious criminal allegations.

The decision of the Eighth Circuit comports with the direction this Court has given in *Edwards v. Arizona, supra*—the right to be represented by counsel is to be zealously guarded. The State has a heavy burden to overcome the presumption that once an accused has invoked his right to counsel he retains that right throughout the proceedings. Any waiver of the right must be closely scrutinized and limited to the most narrow parameters. Here the parameters were for a narrow polygraph, not an open-ended discussion once deceit appeared.

Finally, the Court should not grant certiorari in this case because to do so would require review in all similar cases. This case does not make new law; it does not represent a conflict in circuits; it does not run counter to previous Eighth Circuit opinion; it merely follows the standards enunciated in *Edwards v. Arizona, supra* and applies them to the facts and circumstances of this case. The conclusion reached as a result of this process is a correct one.

CONCLUSION

The Respondent therefore respectfully requests that the Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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